No. 11803

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN BARCOTT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee.

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

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JURISDICTION

Jurisdiction on this appeal is conceded for the reasons stated by appellant.

STATEMENT OF THE CASE

The Charge.

The appellant was charged by an indictment con-

taining three counts with violations of 26 U.S.C. 145(b) for willful income tax evasion for the calendar years of 1943, 1944 and 1945. (R. 2-5).

A summary of the figures as to income reported and actually received, and tax paid and actually due, as charged in the indictment follows:

Calendar Year	Income Reported	Actual Income	Tax Reported	Actual Tax Due
1943	$6,720.40	$12,406.33	$1545.38	$3,646.25
1944	5,632.57	9,926.61	1288.45	2,727.85
1945	7,388.98	11,138.92	1833.36	3,201.96

The appellant plead not guilty and after trial to a jury was found guilty on all three counts. (R. 37) Pursuant to the verdict, and on November 24, 1947 a judgment was entered imposing imprisonment for ten months, and a fine of $750.00 on each count, the terms of imprisonment to run concurrently and the fines to be accumulative. (R. 41)

The Facts.

Mr. Stanley Nielsen, an Agent of the Bureau of Internal Revenue, had learned of the defendant having obtained ten one-thousand dollar bills with currency of ordinary denomination. (R. 71) On January 28, 1946, having such information, the agent called upon Mr. Barcott and advised him that he was investigating the currency transaction. Barcott offered to take the agent to his safety deposit box to show him the $10,000. (R. 72) Upon opening the

safety deposit box the defendant produced two packages of currency, stating it to be the $10,000 they had been talking about. He did not get this currency from his safety deposit box, however, but from his person, and instead of its being $10,000 it actually was $20,000 in currency. (R. 73-74)

Nielsen, the agent, inventoried the contents of the safety deposit box in the presence of Barcott, and found it to contain an additional $3,000 in currency, and approximately $75,000 face value of government war bonds. (R. 74) During the course of making this inventory Barcott made several offers of cash and other valuables, to the agent to induce him to make a favorable report. (R. 75, 76).

At a later date, on February 13, 1946, the same agent, together with another Internal Revenue Agent, Harry Swanson, went with the defendant, and again inventoried the contents of this safety deposit box, and the same contents were found in it. (R. 77, 115) On this occasion the agents for the first time learned that Barcott had another safety deposit box. This was inspected by the agents on February 13, and at this time it was found to contain only miscellaneous papers. (R. 78, 115)

The foregoing facts are all admitted by the defendant, except the attempt to bribe Nielsen, which

fact the defendant denied.

Immediately after leaving Nielsen on the occasion of the first inventory of the defendant's safety deposit box, the defendant made an entry into his other safety deposit box. He again entered this second box the following morning at 9:02 A. M. and was unable to explain the purpose of that entry. (R. 294-6; plaintiff's exhibits 10 and 11).

The date of issue on the war bonds will, of course, show the approximate date of purchase. (R. 122; plaintiff's exhibits 4, 5, and 6). During the year 1943 the defendant purchased bonds at a cost to him in the sum of $20,750. (R. 126) During 1944 his increase in war bonds, at a cost to him, was in the sum of $19,000 (R. 128), and in 1945 he purchased bonds at a cost to him in the sum of $20,000 (R. 129).

Harry O. Swanson, an Internal Revenue Agent, had made a comprehensive check of the known assets of the defendant. (R. 116). These assets consisted of the war savings bonds and cash in the sum of $23,000, which were found in his safety deposit box; a checking account in the name of California Oyster House, and a savings account in the name of the defendant (R. 88; plaintiff's exhibits 7 and 8, a real estate and conditional sales contract in favor of the defendant (R. 88-9; plaintiff's exhibit 9); 14 shares

of capital stock of Fishermen's Packing Corporation (R. 105-9; plaintiff's exhibit 12); and, of course, the equipment in his place of business, the California Oyster House, and certain real estate.

On the basis of this information Swanson computed the defendant's increase in net worth during the period from January 1, 1943 through December 31, 1945. (R. 116-30). He computed the defendant's net worth at the beginning of the period as being $57,278.56 (R. 119 and 124), and in doing so gave him credit for the $23,000 in cash as though he had that cash on hand at the beginning of the period. (R. 121). At the end of 1943 the net worth had increased to $79,206.60, an increase of $21,928.10. (R. 127). At the end of 1944 the net worth had increased to $97,462.75, an increase during the year of $18,256.09. (R. 129). At the end of 1945 the net worth had increased to $116,316.60, a net increase for the year of $18,853.85. (R. 130 and 133).

This same agent, Mr. Swanson, checked the income tax returns of the defendant for the period from 1919 through 1942. During some of these years the defendant filed an income tax return, which, of course, showed his income for those years. In other years during this period no return was filed by him. For the purpose of determining the highest possible net

worth of the defendant as of the end of 1942 Swanson computed his maximum earnings for this 24-year period, i.e., from 1919 to 1942, as reflected by the tax returns filed, and the maximum exempt earnings in those years in which no returns were filed. From the total arrived at by this method the agent then deducted the cost of living for Barcott and his family, estimated at $125.00 per month. This left a net worth as of December 31, 1942 of $53,000. This figure corroborated rather closely the net worth as of the same date in the sum of $57,278.00, which the agent had arrived at from an investigation of the known assets of Barcott. (R. 142-4).

On May 22, 1940 Barcott surrendered a portion of his stockholding in Fishermen's Packing Corporation in payment of a $200.00 note which he had owed that corporation since 1932. (R. 149, 150; plaintiff's exhibit 14). This stock paid him 6% dividend within twenty days after he surrendered a portion of it. (R. 274).

The foregoing facts were all disclosed in the government's case in chief. Additionally it was shown in the defendant's case that during the years 1937 to 1942 inclusive the defendant purchased numerous pieces of furniture and equipment on installment contracts. (R. 405-6).

The defense submitted was to the general effect that the defendant had accumulated some $100,000 prior to 1942 from his restaurant business and that he was enabled to accumulate this sum because there were no deductions therefrom for living expenses or otherwise; that all living expenses during the period from 1920 through 1938 were paid from tips received by the defendant's wife, who during that period worked in the restaurant.

The defendant produced a Certified Public Accountant, Robert E. Birch, who computed the defendant's possible net worth as of the end of 1942. He did it in much the same manner as the Internal Revenue agent had, except that his computation was based upon information given to him by Mr. Barcott, without records to verify it, and his computation included tips reportedly received by the defendant's wife at the rate of $7.50 per day for 300 days a year during the 16 year period from 1920 through 1935. (R. 368). He arrived at a net worth figure substantially in excess of that determined by Mr. Swanson, the Internal Revenue agent, but his computation also showed that Barcott had understated his income for tax purposes by $43,686.18. (R. 397).

ARGUMENT

We shall discuss the appellant's Assignment of Errors in the same order as they have been argued in appellant's brief.

Sufficiency of the Evidence.

In presenting this issue, the appellant includes with it their second assignment of error, which claims error in the admission of Swanson's testimony as to net worth as of December 31, 1942, on the ground that it was based upon assumptions.

As we conceive their argument on this issue, it is that Swanson's computation of increase in net worth during the three years in question was based primarily upon the increase in accumulation of war bonds during those years, and that it was pure assumption that such bonds were purchased from earnings during those years. This argument overlooks the testimony of Swanson to the effect that he got this information directly from Barcott. Swanson testified as follows: (R. 136).

"Q. And what he purchased after January 1, 1943, then you assumed he purchased on that time?

A. At the issue date, yes, sir.

Q. Issue date. And you assumed that he got that money from the business?

A. Yes, I had no other knowledge.

Q. You had no other knowledge. You made no other inquiry?

A. I made other inquiry, yes, sir.

Q. Where did you inquire?

A. We inquired from Mr. Barcott, he was asked numerous times after the first contact if he had any other source of income.

Q. Just asked the sources of income?

A. That's right."

It also ignores the testimony of Nielson as to what Barcott told him, as follows:

> "I have always filed income tax returns in the operation of my restaurant, and I ordinarily accumulate $5,000 or $6,000, and purchase U. S. Savings bonds." (R. 72).

That testimony, if believed by the jury, was an admission by Barcott that the money used in the purchase of these bonds came from the earnings from his restaurant business. In view of such information coming from the defendant, there was no need or basis for assumption on the part of the witness. It then became an admitted fact.

Terming this evidence of Swanson's as pure assumption the appellant therefore contends that there was not sufficient evidence to submit the case to the jury. This same contention on strikingly similar facts has been urged in numerous other cases and rejected.

Almost identical issues and contentions are presented in the case of *Gleckman vs. U. S.* 80 F. (2d) 394 (C.C.A. 8). In this case also the government agents were unable to determine income by resort to the defendant's books or records because of the lack thereof, and so they predicated their proof upon an examination of deposits made in defendant's bank accounts. They were unable, however, to trace the sources of these deposits. Concerning the testimony the court stated at page 397:

> "It appeared on the trial that there had been deposits made to the credit of Mr. and Mrs. Gleckman in the two banks during 1929 amounting to $156,822.06, of which the auditor was able to trace and eliminate $63,915.48 as nontaxable loans, stock and bond transactions, and rents and salary items, leaving a balance of untraceable cash and unexplained deposits of $92,906.58."

And again on pages 398 and 399:

> "There was no direct testimony to show what business transacted by Mr. Gleckman had produced the large sums of money that accrued to him in addition to the items reported in his return. There was no direct proof of any specific deals or transactions outside of those included in his return which were shown to have netted

Mr. Gleckman any gains or profits. All of the testimony adduced for the defendant concerned the large items of receipts that accrued from nontaxable transactions, and none of the government's witnesses testified to any particular gain accruing to Mr. Gleckman from any specific transactions beside those reported by him. There was no direct testimony that he received any dividends from his distillery or other stocks.

And it is the contention of the appellant that the prosecution must fail on that account. * * * But the argument is that as the government could not prove where or how or from whom Mr. Gleckman got the sums aggregating more than $150,000 shown to have come into his hands during the year over and above all the items eliminated by the auditors and all of the items included in his income report, it could not be found that he earned it or that it came to him as gains or profits. The point is particularly insisted upon with reference to the untraceable items and the cash items of the bank deposits. Such items it is said may just as well have been drawn from nontaxable transactions as from services or business."

In considering the sufficiency of the evidence, the court states at page 399:

"Undoubtedly the burden was upon the government to prove that an income tax was due from Mr. Gleckman for the years in question over and above the amount returned — he could not be guilty of attempting to evade or defeat a tax unless some tax was due. *O'Brien v. United States* (C.C.A. 7) 51 F. (2d) 193. It may be conceded also that the bare fact, standing alone, that a man has deposited a sum of money in a bank would not prove that he owed income tax

on the amount; nor would the bare fact that he received and cashed a check for a large amount, in and of itself, suffice to establish that income tax was due on account of it.

On the other hand, if it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable." (Citing cases).

And again at page 401:

"The gist of the charge here is that there was a tax due and a willful attempt to evade it. Testimony sufficient to satisfy the jury beyond a reasonable doubt upon the issue was all that was required and the proof that large amounts were taken out of some kind of business and were used as his own by the defendant, considered together with the circumstantial evidence referred to and the evidence tending to show that he had unreported net gains during the year and that his net worth was increased thereby, required submission to the jury."

To show the similarity in the contentions now made by appellant and those rejected by appellate courts in other cases, we quote the court's statement of the appellant's contention in the case of *Malone vs. U. S.* 94 F. (2d) 281 (C.C.A. 7) appearing at page 287, as follows:

"The fourth assignment relates to the refusal of the court to direct a verdict. It is defendant's

> contention that there is no proof of guilt. By this is meant there is no evidence proving that the unreported bank deposits were income, as distinguished from a gift, inheritance, or loan, and even if they were shown to have been income, there was no proof that such were income earned for the years in question."

In this case the appellant during the years involved was a member of the Illinois State Tax Commission, which commission fixed the capital stock tax of domestic corporations in that state. The government's evidence showed that there were large deposits in currency to the bank accounts of the defendant over and above his reported income. There was some circumstantial evidence that some of these cash deposits came from corporations whose capital stock tax was before the tax commission for determination. The defendant, however, testified that they were from an accumulation of money received as campaign contributions in prior years, and held in a safety deposit box in cash until the deposits were made in his bank accounts. In holding that the government's evidence made a case for the jury the court said, beginning at page 287:

> "We have heretofore set forth rather fully the testimony and shall not do so again. The fact that the defendant, in addition to his other reported income, deposited in the bank such large amounts of currency on so many occasions under the circumstances shown by this record, while of

itself, not sufficient, is nevertheless a rather convincing circumstance in support of the charge. Notwithstanding defendant's contention to the contrary, we think the language of the court in *Gleckman v. U. S.*, 8 Cir., 80 F. (2d) 394 is applicable here. There it was said on page 399: 'If it be shown that a man has a business or calling of a lucrative nature and is constantly, day by day, and month by month, receiving moneys and depositing them to his account and checking against them for his own uses, there is most potent testimony that he has income, and, if the amount exceeds exemptions and deductions, that the income is taxable.'

It is said this language is inapplicable to the present case inasmuch as Gleckman was secretly in the illicit liquor business; that in the instant case there is no evidence of any business conducted by the defendant other than that from which defendant's income was accounted for in his returns. We do not agree with this contention. The fact is, there is evidence to support the conclusion that defendant had a rather lucrative income in connection with his membership on the Tax Commission. From such source, it may be concluded, he received $32,500 in 1927; $31,000 in 1928; $15,000 in 1929, and $41,000 in 1930. The fact that the final assessments against corporations from whom this money was received, were decreased, in connection with the circumstances under which the defendant received the money, was sufficient to justify a jury in believing the same was received by the defendant as bribes, and that at least a sizable portion of the currency deposits came from such a source and constituted a part of defendant's income. The evidence that defendant's net worth during the

years in question was increased in an amount somewhat similar to the amount of the currency deposits is not without significance.

When the defendant was interviewed by internal revenue agents in 1930, he surely knew the purpose of the investigation was to ascertain if there had been an evasion of income tax. Instead of explaining the source of the currency deposits, he displayed an ignorance concerning the same which cannot be attributed to one of his experience and intelligence. Neither is it consistent with innocence. The excuse is offered for him that his failure to make an explanation at that time was due to the secrecy attending the manner in which he received the funds. We are unable to perceive why the divulging of such a sordid secret could not have been made at that time with as much propriety and even more so before two revenue agents, in a private office, rather than before a jury and the world a few years later. It is more reasonable to conclude that the explanation now offered was not in existence at that time. Thus, his refusal to explain, when given an opportunity, is another circumstance pointing toward guilt. There was no burden, of course, upon the defendant to testify at the trial. He could explain the source of the rather fabulous sums deposited in his bank account and used in his business, or not, just as he saw fit. When, however, he became a witness and sought to explain, the jury was not bound to accept his story as true. Their verdict discloses they disbelieve him, and in this, we think, they were entirely justified. In corroboration of defendant's explanation, our attention is called to fabulous sums often expended in presidential campaigns. This affords little, if any, support to the story as related by defendant. The determination of such questions of fact, however, are within the prov-

ince of the jury and we find no reason to disagree."

In *Guzik v. United States*, 54 F. (2d) 618 (C.C.A. 7), an income tax case predicated upon unreported income as shown by bank deposits, the court held at page 620 as follows:

> "Appellant also contends that the trial court erred in overruling his motions for a directed verdict on the ground that the government failed to prove a net taxable income in excess of the amount shown on the appellant's returns. As we stated in the *Oliver Case*, supra, even though the deposits in themselves were not sufficient evidence to establish the conclusion that they were all income, they nevertheless were substantial evidence of income. * * * * in the instant case there was direct evidence to the effect that a considerable part of the large sums deposited in appellant's bank accounts came from the operation of gambling businesses in a suburb of the city of Chicago. Moreover, other evidence, while not as direct, was about as persuasive that other sums so deposited came from his participation in other enterprises in the nature of a gambling business, such as dog races, etc.
>
> It may be true that appellant did not receive for himself all of the profits of these gambling businesses, but that profit nevertheless was turned over to him and under his direction placed in his bank account. It may also, be true that substantial sums were by him paid out for the protection of these unlawful businesses, leaving his net profits considerably less than those claimed by the government. But if such deductions were made, or if the sums deposited in appellant's name were subsequently divided

among others interested with him, there is no word from him nor from other witnesses to establish the possibility.

Certainly the evidence in this case respecting the guilt of the accused was not only sufficient to go to the jury, but, in the absence of any explanation or denial, appellant's guilt seems well established."

In the case of *Murray v. U. S.* 117 F. (2d) 40 (C.C.A. 8) the defendant during the years involved was Director of Public Works at Kansas City, Missouri and was WPA Administrator for the state of Missouri. In these capacities it was his duty to let contracts for public works. It was shown that he received substantial sums of money, not reported by him as income, from certain contractors who had obtained large public works contracts through the defendant's offices. The defendant admitted receipt of the sums of money, but claimed that they were gifts. In considering the sufficiency of the evidence the court held beginning at page 43:

"If the money and bonds received by defendant were not gifts, they were income and a failure to include them in his income tax return, if willful, would constitute an attempt to evade and defeat the income tax. (Citing cases)

"It is urged by the defendant that his conviction rests solely upon circumstantial evidence, and hence, must be of such probative character as to exclude every reasonable hypothesis but that of guilt, and be inconsistent with his innocence. The evidence need only be examined to an extent

> necessary to determine that there was substantial evidence if believed by the court, to sustain the court's finding of guilt beyond a reasonable doubt.
>
> * * * * * *
>
> The only evidence in the record inconsistent with the defendant's guilt is his testimony that he received gifts. The lower court, whose business it was to judge of the credibility of the witnesses, held that this testimony was incredible. The court accepted defendant's acts, rather than his words, as speaking the truth. His secretive use of cash, his explanation of his right to the "cut" in the prison contract, and his favoritism to the concerns in which the donors had an interest, are all inconsistent with the innocent receipts of gifts."

It will be noted that in the foregoing cases the unreported income in most of them first came to light by deposits in bank accounts. In our own case the unreported funds first came out of hiding when invested in government bonds. There would seem to be no substantial basis for a distinction in the two situations. However, in the case of *U. S. v. Johnson*, 123 F. (2d) 111 (C.C.A. 7) the court held that a question for the jury is presented even where the evidence goes no further than to show spending during the year in excess of the reported income. The court so held beginning at page 124:

> "The Government sought to sustain the charge that Johnson failed to report all of his taxable

income for the years 1936 to 1939, inclusive on two distinct theories: * * * *

(b) By offering proof that he expended in said years more cash than he had available for spending, according to the income reported."

"On the expenditure theory, however, the case is more favorable to the Government. This theory was sought to be established by proving a statement purported to have been made by Johnson on January 1, 1932, that he had cash on hand in the amount of $78,000. Thereafter his income, as disclosed by his returns and his expenses, was shown year by year. The expenses, as shown by the Government from 1932 to 1939, were greatly in excess of his income for the same period. Admittedly, under this theory, the proof failed to establish the charge as to the year 1936. His income as reported for that year, plus what he had on hand at the beginning of the year, exceeded his expenditures by more than $184,000. For the year 1937, however, his expenditures exceeded his income by $106,000; for 1938 by $367,000, and for 1939, by $151,000. True, there is a dispute as to many of the items involved in these calculations, and as to some of them, a serious dispute. We are of the opinion, however, that the proof of his income on this so-called expenditure theory was sufficient to present a jury question. As the proof on this theory, however, does not support the charge as to the year 1936, (count one) Johnson's motion for a directed verdict as to that count should have been allowed. As to the other counts, it was properly denied."

The fair import of these cases is that while a showing of deposits or expenditures in excess of re-

ported income standing alone may not be sufficient, that when such evidence is combined with other direct or circumstantial evidence, that a case is made for the jury's determination. In the present case there is substantial evidence in addition to that of the increased assets, pointing to and corroborating such increased assets being income for the years in question. Some of the more obvious elements of such evidence are as follows: The defendant's secretive hoarding of large sums of currency in safety deposit boxes; his attempted bribe of the agent when first confronted with an investigation; his failure to advise the agents, while being questioned, about sources of income, of the later asserted income from his wife's tips; (R. 287) the understatement of income as developed by his own accountant; the corroboration of his net worth at the beginning of the period, as developed from his reported income over the preceding 24 year period; the showing of his impecunious condition in the years immediately preceding 1943, as demonstrated by his surrender of dividend paying stock in the Fishermen's Packing Corporation to liquidate a $200.00 obligation, and his purchase of property on installment contracts; and, of course, the well known fact that business profits were abnormally high during the war years.

Testimony of Bribe Offer to Agent Nielson.

In his third Assignment of Error appellant contends that the testimony of Internal Revenue Agent Nielson concerning Barcott's tender of a bribe for a favorable report at the time he was first interviewed was inadmissible.

Such testimony has invariably been held admissible, even though it shows another crime than that charged in the indictment, on the theory that it demonstrates a consciousness of guilt on the part of the defendant.

In *Madden v. U. S.* 20 F. (2d) 289 this court held testimony concerning an effort on the part of the defendant to dissuade a government witness from testifying was properly admitted, stating at page 294:

> "Both Rasmussen and his wife testified before the jury as to what occurred at their hotel. Under a familiar rule, such testimony was properly received against Madden, as tending to show a consciousness of guilt."

In *Rocchia v. U. S.* 78 F. (2d) 966, this court also held that testimony of an attempt on the part of the defendant to bribe an arresting officer was competent in a prosecution under the Internal Revenue laws with respect to the operation of a distillery. See page 972.

In *U. S. v. Picarelli*, 148 F. (2d) 997 (C.C.A. 2) defendant and one Ward were charged jointly with unlawful possession of gasoline ration coupons. The court says beginning at page 997:

> "As to Picarelli the case was somewhat less strong but was still sufficient to submit to the jury. Picarelli owned the parked automobile. The officer saw him leave the driver's seat walk to a vacant lot, pick up some empty bottles and bring them back to the car. At this moment the policeman intervened. Picarelli stated to the arresting officer that he did not know where the coupons came from and that Ward said he found them in the car. On the way to the police station, Picarelli pulled his car to the curb and said to the policeman, "Listen, Officer, can't we talk this thing over?" No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settlement may be regarded as evidencing consciousness of guilt."

If we fully comprehend appellant's contention on this assignment, he concedes the rule generally. He attempts to escape the effect of the rule by the following process. The agent advised Barcott he was investigating black market activities, as well as income tax evasion. Hence, the offer to bribe does not necessarily show a "consciousness of guilt" as to income tax evasion, but may only show a "consciousness of guilt" as to some black market activities.

We think the distinction is too nice to compel exclusion of the testimony. It will be noted that the

appellant compares this sort of testimony to testimony of flight following an offense, and argues that flight from one crime would not be admissible in a trial for another crime.

This contention has been directly overruled in *Affronti v. U. S.* 145 F. (2d) 3 (C.C.A. 8) wherein the court states at page 7:

> "The defendant contends that the court committed reversible error in permitting the government to show that the defendant, by disappearing, not only forfeited his bond in this case, but also forfeited bonds in two other cases pending against him at the time. We think the contention is without merit. The government was entitled to show the circumstances under which the defendant disappeared. Moreover, the evidence complained of was at least as beneficial to the defendant as it was harmful, since it showed that the indictment in the instant case was not the only inducement for his leaving the jurisdiction."

Appellant's reasoning in this connection is again denied, at least inferentially, in *DiCarlo v. U. S.* 6 F. (2d) 364 (C.C.A. 2) wherein testimony was admitted and sustained of an offer to bribe made by the defendant's attorney out of defendant's presence. See page 368. If such testimony of a bribe offer is admissible it could not well depend upon the defendant's *awareness* of the nature of the charge to be later brought against him.

The Bill of Particulars.

Under assignment of error No. 4 appellant complains of error in permitting the government's proof as to unreported income going beyond the sources of income set forth in the Bill of Particulars.

In each count of the indictment the major portion of the alleged true income is designated as "income from business". (R. 3, 4 and 5). A Bill of Particulars was filed by the government stating that this item "income from business" was from the defendant's restaurant business.

Appellant makes no complaint about the other particularizations in the Bill, but the gist of his contention under this issue is that the government's evidence was not sufficient to show that the source of the unreported income was the defendant's restaurant business. Their position in respect to this issue is unsound for the same reasons as is their argument in respect of their contentions concerning the sufficiency of the evidence generally.

There was ample evidence, if believed by the jury, to prove that the major source of appellant's income during the years in question was from his restaurant business. The witness Swanson testified that his knowledge as to this source of income came directly

from admissions or statements by the defendant. (R. 136-7). Appellant's brief constantly refers to Swanson's "assumption" in this respect, but if there was any assumption on the part of Swanson it was predicated upon the defendant's own statements as to his sources of income.

Plaintiff's Exhibit No. 11 Showing Defendant's Entry Into a Safety Deposit Box.

Plaintiff's Exhibit No. 11 is a record of the Washington Safe Deposit Company showing entries into a box rented by that company to the defendant. A brief resume of the facts may be appropriate at this point.

The defendant maintained two safety deposit boxes. One in the National Bank of Washington (R. 89; plaintiff's exhibit 10), which we shall hereinafter refer to as the first box, and one in the Washington Safe Deposit Company (R. 103; plaintiff's exhibit 11), which we shall refer to as the second box. On the first visit of agent Nielson to Barcott, Barcott took him to his first box to show him the $10,000 in currency, which he said he had been accumulating. (R. 72). Barcott said he had this money in the box. (R. 72). However, when they opened the box Barcott

produced the currency not from the box, but from his person, and it was not $10,000, but $20,000. (R. 73). There was an additional $3,000 actually in the box. It was during this visit to the first box that the defendant became very agitated, and according to Nielson made the bribe offer. This occurred on January 28, 1946, and they left the first box approximately 12:30 P. M. (R. 80). At 12:45 P. M., fifteen minutes later, the defendant entered his second box, and again entered it at 9:02 A. M. the following morning. (Plaintiff's exhibit 11; R. 296). The defendant was unable to account for these entries into his second safety deposit box, and manifested considerable distress when being questioned about it. (R. 295-6)

In view of the defendant's admitted accumulation of large sums of currency in his safety deposit box, and business safe, these unexplained entries into this second box were circumstances pertinent to the issue of withholding and secreting income. The very time element involved is significant. Most of the cases cited hereinabove under the appellant's first and second assignments rely upon the maintenance of safety deposit boxes for the keeping of currency as being one of the significant circumstances in income tax evasion cases. The keeping of currency in safety deposit boxes is one of the more common devices used to keep

income concealed and from showing on the usual records. The cases cited *supra* confirm this fact.

The Court's Charge to the Jury.

The appellant's next two assignments of error, No. 6 and 7 refer to the court's instructions to the jury and hence we shall consider them together.

Assignment No. 6 complains of the court's refusal to give parts of appellant's requested instruction No. 2. This instruction, and what the court did with it, is set forth in the record at pages 29 to 32, and in appellant's brief at pages 48 to 50.

We think it must be apparent that those portions of that instruction which the court refused are incorrect statements of the law and were therefore properly refused. For instance, that portion of the instruction designated as subdivision (a) and reading as follows:

"You are instructed that the prosecution must prove to you, beyond all reasonable doubt, the following facts:

> (a) That the defendant on December 31, 1942 did not own or possess any greater amount of assets or 'net worth' than that which the prosecution claims the defendant owned on that date."

wholly fails to give recognition to the principle of law, admitted by appellant, that the government does not

need to prove exactly the amount of evaded income tax or income alleged in the indictment. The effect of this portion of the requested instruction is to tell the jury that if the net worth, as computed by the government at the beginning of the period, was even one cent less than his actual net worth on that date, that then the government's entire case must fall.

That portion of the requested instruction designated (c) and reading,

> "That the assets purchased for the year 1943 were purchased and acquired with net income of the defendant derived from the following sources:"

is palpably wrong. Also, it demonstrates the appellant's complete misconception of the theory of net worth proof. Net worth increase during a year is circumstantial evidence of income for that year, as the court fairly instructed the jury. Note that in this subdivision (c) of the instruction the appellant used the words "assets purchased". It implies that assets purchased during a certain year would have to be shown to have been purchased from income from that year. Such proof is not necessary. It may well be that assets purchased in a certain year were purchased from accumulations of cash from a prior year and that such cash accumulations were then replaced with income from the current year. This process

would still show an increase in net worth, and such increase would tend to prove the ultimate fact of income earned during that year.

The appellant's obvious misunderstanding of the effect of net worth increase is again shown in his complain under assignment of error No. 7 in which he alleges error in a portion of an instruction given by the court. The appellant complains that the instruction advised the jury that a showing of purchase of war bonds in excess of reported income made a prima facia case. (Appellant's brief 52).

This is a strained interpretation of the instruction and is arrived at, partly at least, by accentuating only excerpts of the court's charge. The complained of portion is a part of the court's charge on the effect of circumstantial evidence. The paragraph immediately preceding that quoted by appellant states this:

> "Circumstantial evidence is quite as competent as direct evidence when certain rules are applied to its weight and consideration, and *I think in this case the government relies upon circumstantial evidence to establish the income of the defendant.*" (R. 450) (Italics supplied)

Further portions of the court's charge on circumstantial evidence are as follows:

> "The government therefore relies upon the fact that when such an increase is shown, (i.e., increase in net worth) *it has established circum-*

stantially that such income was taxable income * * * * *". (R. 450) (Italics supplied)

"Now an essential element of the offense herein is that the defendant's *taxable income* was greater than that which he reported. If such fact is not proven then you would find the defendant not guilty." (R. 451) (Italics supplied)

"*If you find* from the evidence *that the increased net worth* of the defendant in the years in question here, *measured the taxable income* of the defendant in a substantial amount of that reported * * * *". (R. 451) (Italics supplied)

"In considering this matter, if you can reasonably account for the increased net worth of the defendant * * * * upon any reasonable theory or hypothesis that will admit of his innocence, it is your duty to do so and to acquit him." (R. 451-2)

It seems quite obvious that this charge to the jury carefully pointed out to them that increase in net worth was not the ultimate fact, but that it was only to be considered by them as circumstantial evidence tending to establish the ultimate fact of income, and the court specifically advised the jury that it was up to them to determine, if in fact, the increase in net worth actually measured income.

We think on the whole the court's charge was unusually fair and understandable. He carefully pointed out to the jury that there were three separate distinct charges, and that they must consider each count separately and not confuse them. (R. 443)

He then clearly defined and repeated the essential elements of the charge. These essential elements he told the jury were that the defendant owed more income tax than shown on his return; that he knew he owed more income tax than shown; and that he wilfully attempted to evade or defeat a part of such tax by filing a false return. (R. 446-7). As already pointed out, he then advised the jury that the government's evidence was circumstantial, and cautioned them concerning the usual limitations with which they must consider circumstantial evidence. (R. 450-2).

To appellant's complaint against the court's charge might well be applied the well settled principle that in considering the correctness of instructions, they must be considered as a whole and that detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context.

Hargreaves v. U. S. 75 F. (2d) 68, 73 (C.C.A. 9);
Taylor v. U. S. 142 F. (2d) 808, 817 (C.C.A. 9);
Graham v. U. S. 120 F. (2d) 543, 546 (C.C.A. 10);
Moffett v. U. S. 154 F. (2d) 402, 405 (C.C.A. 10).

The Prosecutor's Argument to the Jury.

Toward the close of the Assistant United States

Attorney's opening argument to the jury he made the following statements:

> "You and I know, when we see these hearings on communism back in Congress today. We hear about what is going on all over the world, and our system of government today is standing a test. We are being tried. If people feel that you can walk into a court room like this and walk out and get away with what this man did, they don't believe in our system any more."

Appellant's counsel objected, and the court promptly instructed the jury to disregard these comments of the prosecutor. Apparently at that time appellant's counsel was satisfied with the court's admonition because no further objections or requests were made in respect of the prosecutor's statements. However, appellant now complains of these remarks by government counsel under their 8th assignment of error.

We think a fair interpretation of this argument to the jury is that, if in view of the evidence, the defendant should be acquitted, the public generally would lose faith in our system of justice. Appellant places quite a different interpretation upon it, first stating that it meant a failure to convict would mean the jury had lost faith with our system of government. (Appellant's Brief 54) From this point appellant jumps to the conclusion that the argument had

the effect of accusing the jury of being subversive if they failed to convict. (Appellant's Brief 55). This flight of rhetoric of the appellant in this court, is at least as specious as is the argument complained of in the court below.

In any event, the court's instruction to the jury to disregard it must be held to have eradicated whatever impropriety there was in it. See *Phelan v. U. S.* 249 F. 43, 45 (C.C.A. 9), and *Dunn v. U. S.* 50 F. (2d) 779, 782 (C.C.A. 9). And if appellant did not think so, the burden was upon him at that time to have made further objection or requested a mistrial. He is not permitted to sit silently by and take chances on a favorable verdict, and then complain when it turned out unfavorable.

Breedin v. U. S. 73 F. (2d) 778, 780 (C.C.A. 4);
Gerard v. U. S. 61 F. (2d) 872, 875 (C.C.A. 7).

CONCLUSION

We suggest that the proceedings below were free of error and that the judgment should be affirmed.

Respectfully submitted,

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